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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 DEBBIE BAIZE,

11
12 Plaintiff,

13 v.

14 AUSTIN BURTON LLOYD,

15 Defendant.
16
17

Case No. 14-cv-02573-BAS(JMA)

ORDER:

(1) **GRANTING MOTION FOR
LEAVE TO PROCEED IN
FORMA PAUPERIS (ECF
NO. 2); AND**

(2) **DISMISSING ACTION
WITHOUT PREJUDICE**

18 On October 29, 2014, Plaintiff Debbie Baize (“Plaintiff”), proceeding *pro se*,
19 filed a handwritten complaint against Defendant Austin Burton Lloyd
20 (“Defendant”) asserting various violations of her constitutional rights. (ECF No. 1
21 (“Compl.”).) On the same day she filed her complaint, Plaintiff also filed a motion
22 seeking leave to proceed *in forma pauperis* (“IFP”). (ECF No. 2.) For the
23 following reasons, the Court (1) **GRANTS** Plaintiff’s IFP motion, and (2)
24 **DISMISSES WITHOUT PREJUDICE** this action in its entirety.

25 **I. MOTION FOR LEAVE TO PROCEED IFP**

26 All parties instituting any civil action, suit, or proceeding in a district court of
27 the United States, except an application for writ of habeas corpus, must pay a filing
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1 fee. *See* 28 U.S.C. § 1914(a), (b).¹ An action may proceed despite a plaintiff's
 2 failure to prepay the entire fee only if he or she is granted leave to proceed IFP. 28
 3 U.S.C. § 1915(a). The determination of indigency falls within the district court's
 4 discretion. *Cal. Men's Colony v. Rowland*, 939 F.2d 854, 858 (9th Cir. 1991), *rev'd*
 5 *on other grounds* 506 U.S. 194 (1993) (holding that "Section 1915 typically
 6 requires the reviewing court to exercise its sound discretion in determining whether
 7 the affiant has satisfied the statute's requirement of indigency"). It is well-settled
 8 that a party need not be completely destitute to proceed *in forma pauperis*. *Adkins*
 9 *v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 339-40 (1948). To satisfy the
 10 requirements of 28 U.S.C. § 1915(a), "an affidavit [of poverty] is sufficient which
 11 states that one cannot because of his [or her] poverty pay or give security for costs .
 12 . . and still be able to provide himself and dependents with the necessities of life."
 13 *Id.* at 339. At the same time, however, "the same even-handed care must be
 14 employed to assure that federal funds are not squandered to underwrite, at public
 15 expense, . . . the remonstrances of a suitor who is financially able, in whole or in
 16 material part, to pull his own oar." *Temple v. Ellerthorpe*, 586 F. Supp. 848, 850
 17 (D.R.I. 1984).

18 District courts, therefore, tend to reject IFP applications where the applicant
 19 can pay the filing fee with acceptable sacrifice to other expenses. *See e.g.*,
 20 *Stehouwer v. Hennessey*, 841 F. Supp. 316, 321 (N.D. Cal. 1994), *vacated in part*
 21 *on other grounds*, *Olivares v. Marshall*, 59 F.3d 109 (9th Cir. 1995) (finding that a
 22 district court did not abuse its discretion in requiring a partial fee payment from a
 23 prisoner who had a \$14.61 monthly salary and who received \$110 per month from
 24 family). Moreover, "*in forma pauperis* status may be acquired and lost during the
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26 ¹ In addition to the \$350 statutory fee, all parties filing civil actions on or
 27 after May 1, 2013, must pay an additional administrative fee of \$50. *See* 28 U.S.C.
 28 § 1914(a), (b); Judicial Conference Schedule of Fees, District Court Misc. Fee
 Schedule (eff. May 1, 2013). However, the additional \$50 administrative fee is
 waived if the plaintiff is granted leave to proceed IFP. *Id.*

1 course of litigation.” *Wilson v. Dir. of Div. of Adult Insts.*, No. CIV S-06-0791,
 2 2009 WL 311150, at *2 (E.D. Cal. Feb. 9, 2009) (citing *Stehouwer*, 841 F. Supp. at
 3 321); *see also Allen v. Kelly*, 1995 WL 396860, at *2 (N.D. Cal. June 29, 1995)
 4 (holding that a plaintiff who was initially permitted to proceed *in forma pauperis*
 5 should be required to pay his \$120 filing fee out of a \$900 settlement). In addition,
 6 the facts as to the affiant’s poverty must be stated “with some particularity,
 7 definiteness, and certainty.” *United States v. McQuade*, 647 F.2d 938, 940 (9th Cir.
 8 1981).

9 Having read and considered Plaintiff’s application, the Court finds that
 10 Plaintiff meets the requirements in 28 U.S.C. § 1915 for IFP status. Plaintiff is
 11 unemployed and currently receiving \$1,026.00 per month in disability or workers
 12 compensation. (IFP Mot. ¶¶ 2–3.) No other sources of income are listed. In terms
 13 of assets, Plaintiff owns an unfinanced 1998 Hyundai. (*Id.* at ¶ 6.) Plaintiff has no
 14 checking accounts or separate savings/IRA/money market/CDS. (*Id.* at ¶¶ 4, 5.)
 15 Plaintiff does not list her monthly expenses in her IFP motion. However, Plaintiff
 16 filed a motion for appointment of counsel on the same day she filed her complaint.
 17 (ECF No. 3.) In this motion, Plaintiff declared under penalty of perjury that her
 18 monthly expenses include \$500 for rent, \$300 for food and \$200 for other
 19 miscellaneous bills. (*Id.* at p. 7.) Plaintiff’s monthly income and monthly expenses
 20 are nearly equivalent. Consequently, the Court finds that requiring Plaintiff to pay
 21 the court filing fees would impair her ability to obtain the necessities of life. *See*
 22 *Adkins*, 335 U.S. at 339.

23 In light of the foregoing, the Court **GRANTS** Plaintiff’s application for leave
 24 to proceed *in forma pauperis*. (ECF No. 2.)

25 **II. SUBJECT MATTER JURISDICTION**

26 **A. Legal Standard**

27 “Federal courts are courts of limited jurisdiction.” *Kokkonen v. Guardian*
 28 *Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). “They possess only that power

1 authorized by Constitution or a statute, which is not to be expanded by judicial
 2 decree.” *Id.* (internal citations omitted). “It is to be presumed that a cause lies
 3 outside this limited jurisdiction and the burden of establishing the contrary rests
 4 upon the party asserting jurisdiction.” *Id.* (internal citations omitted); *see also*
 5 *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006).

6 “Subject matter jurisdiction based upon diversity of citizenship requires that
 7 no defendant have the same citizenship as any plaintiff.” *Tosco Corp. v.*
 8 *Communities for a Better Env’t*, 236 F.3d 495, 499 (9th Cir. 2001) (per curiam),
 9 *abrogated on other grounds by Hertz Corp v. Friend*, 130 S. Ct. 1181 (2010).
 10 Alternatively, federal district courts also have “original jurisdiction of all civil
 11 actions arising under the Constitution, laws, or treaties of the United States.” 28
 12 U.S.C. § 1331. “A plaintiff suing in federal court must show in his pleading,
 13 affirmatively and distinctly, the existence of whatever is essential to federal
 14 jurisdiction, and, if he does not do so, the court . . . on discovering the [defect],
 15 must dismiss the case, unless the defect be corrected by amendment.” *Tosco*, 236
 16 F.3d at 499 (quoting *Smith v. McCullough*, 270 U.S. 456, 459 (1926)).

17 Although there has not been a request for dismissal, it is well-established that
 18 “a district court’s duty to establish subject matter jurisdiction is not contingent upon
 19 the parties’ arguments.” *See United Investors Life Ins. Co. v. Waddell & Reed Inc.*,
 20 360 F.3d 960, 966 (9th Cir. 2004). Courts may consider the issue *sua sponte*.
 21 *Demery v. Kupperman*, 735 F.2d 1139, 1149 n.8 (9th Cir. 1984). Indeed, the
 22 Supreme Court has emphasized that “district courts have an ‘independent obligation
 23 to address subject-matter jurisdiction *sua sponte*.’” *Grupo Dataflux v. Atlas Global*
 24 *Grp., L.P.*, 541 U.S. 567, 593 (2004) (quoting *United States v. S. Cal. Edison Co.*,
 25 300 F. Supp. 2d 964, 972 (E.D. Cal. 2004)).

26 **B. Analysis**

27 There are no allegations in the Complaint addressing the citizenship of the
 28 parties. The Civil Cover Sheet indicates both Plaintiff and Defendant are residents

1 of California. (ECF No. 1-1.) Accordingly, Plaintiff has failed to establish that this
 2 Court has subject matter jurisdiction on the basis of diversity. “Absent diversity of
 3 citizenship, federal-question jurisdiction is required.” *Caterpillar Inc. v. Williams*,
 4 482 U.S. 386, 392 (1987). The question is therefore whether Plaintiff has alleged a
 5 federal question.

6 “The presence or absence of federal-question jurisdiction is governed by the
 7 ‘well-pleaded complaint rule,’ which provides that federal jurisdiction exists only
 8 when a federal question is presented on the face of the plaintiff’s properly pleaded
 9 complaint.” *Id.* Plaintiff commenced this action against Defendant alleging false
 10 arrest and false incarceration. (Compl. at pp. 2-3.) Plaintiff contends that “the false
 11 arrest and allegations of charges were created for the sole purpose so that
 12 [Defendant] along with his partner Kim Elizabeth Walker could steal and rob[]
 13 [Plaintiff] of all [her] belongings[,] legal documentation[,] important identifications
 14 of [herself] and [her husband,] money[,] jewelry[,] and [her] Grand Jeep Cherokee
 15 car.” (*Id.*) Plaintiff contends the alleged false incarceration violated her
 16 constitutional right to freedom of liberty including her right to earn a living and
 17 economic livelihood. (*Id.* at p. 3.) Plaintiff further contends that Defendant
 18 maliciously deprived her of her constitutional right to liberty and property by means
 19 of defamation, libel, and slander. (*Id.*) Through this action, Plaintiff seeks to repair
 20 the allegedly false charges against her, to establish her innocence, and to repair and
 21 restore her credibility. (*Id.*)

22 Plaintiff does not identify or seek relief under a specified federal statute.
 23 However, as Plaintiff is proceeding *pro se*, the Court will construe Plaintiff’s claims
 24 as arising under 42 U.S.C. § 1983. “Section 1983 creates a private right of action
 25 against individuals who, acting under color of state law, violate federal
 26 constitutional or statutory rights.” *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th
 27 Cir. 2001). Section 1983 “is not itself a source of substantive rights, but merely
 28 provides a method for vindicating federal rights elsewhere conferred.” *Graham v.*

1 *Connor*, 490 U.S. 386, 393-94 (1989) (internal quotation marks and citations
 2 omitted). “To establish § 1983 liability, a plaintiff must show both (1) deprivation
 3 of a right secured by the Constitution and laws of the United States, and (2) that the
 4 deprivation was committed by a person acting under color of state law.” *Tsao v.*
 5 *Desert Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir. 2012) (quotations and citation
 6 omitted). Plaintiff has not alleged or even indicated that Defendant was acting
 7 under color of state law.¹ Accordingly, the Court finds Plaintiff has failed to make
 8 a non-frivolous assertion of a federal claim sufficient to establish federal question
 9 jurisdiction.² *See Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 951
 10 (9th Cir. 1999) (“Any non-frivolous assertion of a federal claim suffices to establish
 11 federal question jurisdiction.”). The Court therefore lacks subject matter
 12 jurisdiction because there is no federal question presented in this action. *See* 28
 13 U.S.C. § 1331.³

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 17 ¹ Plaintiff has similarly not alleged or indicated that Defendant was acting
 18 under color of federal law such that the Court could reasonably construe Plaintiff’s
 19 claim as one arising under *Bivens v. Six Unknown Named Agents of the Federal*
 20 *Bureau of Narcotics*, 403 U.S. 388 (1971). *See Van Strum v. Lawn*, 940 F.2d 406,
 21 409 (9th Cir. 1991) (“Actions under § 1983 and those under *Bivens* are identical
 22 save for the replacement of a state actor under § 1983 by a federal actor under
 23 *Bivens*.”).

24 ² In addition to reviewing *sua sponte* for subject matter jurisdiction, the
 25 Court also has an obligation to dismiss a case at any time if the court determines
 26 that the action “fails to state a claim on which relief may be granted.” 28 U.S.C. §
 27 1915(e)(2)(B)(ii). *See Calhoun v. Stahl*, 254 F.3d 845 (9th Cir. 2001) (holding that
 28 the provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners). The
 Court further finds it appropriate to dismiss this action under 28 U.S.C. §
 1915(e)(2)(B)(ii) for failure to state a claim under 42 U.S.C. § 1983.

³ The Court notes that traditionally a plaintiff who seeks to attack the
 validity or duration of confinement must pursue the exclusive remedy of a writ of
 habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973); *Heck v.*
Humphrey, 512 U.S. 475, 481 (1994).


1 **III. CONCLUSION & ORDER**

2 Because Plaintiff does not assert a claim that presents a federal question as
3 required by 28 U.S.C. § 1331, fails to state a claim under 42 U.S.C. § 1983, and
4 because she fails to allege facts necessary to establish diversity jurisdiction as
5 required by 28 U.S.C. § 1332, the Court **DISMISSES WITHOUT PREJUDICE**
6 this action in its entirety. *See Tosco*, 236 F.3d at 499; 28 U.S.C. §
7 1915(e)(2)(B)(ii). If Plaintiff can correct these deficiencies in the complaint,
8 including but not limited to explicitly identifying the specific federal statutes
9 invoked, she may file an amended complaint no later than **December 31, 2014**. *See*
10 28 U.S.C. § 1653.

11 In light of the dismissal, the Court also **TERMINATES AS MOOT**
12 Plaintiff's motion to appoint counsel. (ECF No. 3.)

13 **IT IS SO ORDERED.**

14
15 **DATED: November 13, 2014**


Hon. Cynthia Bashant
United States District Judge